(2)

Supreme Court, U.S.
FILED
NOV 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-488

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1989

ROBERT SEPULVEDA, et al.,
*Petitioners,*

VS.

PACIFIC MARITIME ASSOCIATION and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 94,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

NORMAN LEONARD
Counsel of Record
1188 Franklin Street
Suite 201
San Francisco, CA 94109
Telephone: (415) 771-6400
*Counsel for Respondent ILWU Local 94*

*Of Counsel:*
LEONARD, CARDER & ZUCKERMAN
RICHARD S. ZUCKERMAN
*For Respondent ILWU Local 94*

GIBSON, DUNN & CRUTCHER
DENNIS A. GLADWELL
J. KEVIN LILLY
*For Respondent Pacific Maritime Association*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

NO PET

## QUESTION PRESENTED

1. Whether the district court clearly erred in finding that the signatories to a collective bargaining agreement did not intend to confer any right of performance on applicants for employment under that agreement.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement of the case | 2 |
| A. Introduction | 2 |
| B. The respondents | 2 |
| C. The collective bargaining agreement | 3 |
| D. The 1985 registration process | 4 |
| E. The decisions below | 5 |
| Argument | 5 |
| A. There is no reason to grant the writ | 5 |
| B. Petitioners lack standing to sue as third party beneficiaries of the port supplement | 6 |
| 1. Petitioners' contrary contentions are meritless | 9 |
| Conclusion | 12 |

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| Ascherman v. General Reinsurance Corp., 183 Cal.App.3d 307 | 7 |
| Cotton v. City of Alameda, 812 F.2d 1245, 1249 (9th Cir. 1987) | 6 |
| Cunha v. Ward Foods, Inc., 804 F.2d 1418 (9th Cir. 1986) | 7 |
| IBEW v. Hechler, ____ U.S. ____, 95 L.Ed 2d 791, 804 | 7 |
| Karo v. San Diego Symphony Orchestra Assn., 762 F.2d 819 (9th Cir. 1985) | 7, 10 |
| Martinez v. Socoma Companies, Inc., 11 Cal.3d 394 (1974) | 8, 9 |
| McTighe v. Mechanics Education Society of America, 772 F.2d 210 (6th Cir. 1985) | 7 |
| Sherman v. British Leyland Motors, Ltd., 601 F.2d 429 (9th Cir. 1979) | 8 |
| Texas Debt of Community Affairs v. Burdine, 450 U.S. 248 (1981) | 6 |
| United Steelworkers of America v. Webber, 443 U.S. 193 (1976) | 6 |
| Walters v. Calderson, 25 Cal.App.3d 863 (1972) | 8 |
| Walters v. Marler, 83 Cal.App.3d 1 (1978) | 8 |

No. 89-488

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1989

ROBERT SEPULVEDA, et al.,
*Petitioners,*

VS.

PACIFIC MARITIME ASSOCIATION and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 94,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The Opinion of the court of appeals (Pet.App. 1a-21a) is reported at 878 F.2d 1137. The opinion of the district court (Pet.App. 22a-48a) is unreported.

### JURISDICTION

The opinion of the court of appeals was filed on June 23, 1989. The petition for a writ of certiorari was filed on September 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## STATEMENT OF THE CASE

### A. Introduction

The Petitioners are three unsuccessful applicants for employment as foremen of longshoremen in the Los Angeles/Long Beach Harbors (hereinafter, "the Harbors"). They were denied registration as foremen during the 1985 registration process conducted jointly by defendants Pacific Maritime Association (hereinafter, "PMA") and International Longshoremen's and Warehousemen's Union, Local 94 (hereinafter, "Local 94"). Petitioners allege, in substance, that PMA and Local 94 breached the Foremen's Port Supplement, 1984-1987 (hereinafter, "the Port Supplement"), which contains provisions applicable to the registration of new foremen, by misjudging the relative qualifications of the applicants. Petitioners further allege that they were among "the best qualified" applicants and, therefore, should have been registered pursuant to the terms of the Port Supplement. The complaint is premised upon Petitioner's contention that they have the right to enforce the Port Supplement as third party beneficiaries.

### B. The Respondents

PMA is an association of companies engaged in maritime shipping, receiving and warehousing of goods in ports along the Pacific Coast of the United States. PMA serves as the representative of its employer members in collective bargaining with the International Longshoremen's and Warehousemen's Union (hereinafter, "ILWU"). PMA member companies employ essentially three groups of employees who belong to distinct bargaining units covered by three separate labor contracts. In the Harbors, the longshoremen's unit is represented by ILWU Local 13, the marine clerks by ILWU Local 63, and the walking bosses and foremen by Local 94. Employees are hired into each unit primarily by means of a formal registration process under the respective contracts. (Pet.App. 23a-25a).

Defendant Local 94 is a labor organization affiliated with the ILWU and is the exclusive bargaining representative of walking bosses and foremen of longshoremen employed by PMA member companies in the Harbors. Walking bosses and foremen serve as

management representatives and directly supervise longshoremen in their work activities. (Pet.App. 24a-26a).

**C. The Collective Bargaining Agreement**

PMA and the ILWU locals representing walking bosses and foremen, including Local 94, have executed successive collective bargaining agreements covering the employment terms and conditions of walking bosses and foremen. The agreement relevant herein is the Pacific Coast Walking Bosses and Foremen's Agreement, 1984-1987 (hereinafter "the Foremen's Agreement"). PMA and Local 94 have also negotiated and executed successive supplemental agreements which cover the employment terms and conditions of walking bosses and foremen working in the Harbors. The relevant supplement herein is the Port Supplement. The two agreements set forth procedures for the registration of foremen to be administered by a joint union-management committee known as the Foremen's Joint Labor Relations Committee (hereinafter, "the Joint Committee"). (Pet.App. 26a-27a).

Pursuant to Section 8.22 of the Foremen's Agreement, which authorizes the registration of additional foremen pursuant to the provisions of local port supplements, PMA and Local 94 have negotiated Section 8 of the Port Supplement. Section 8 contains provisions applicable to the registration of foremen under the administration of the Joint Committee and its Registration Subcommittee. The registration provisions of the Port Supplement apply equally to any individual seeking employment with PMA as a foreman of longshoremen. (Pet.App. 28a-29a).

Sections 8.13 and 8.21 of the Port Supplement provide that the Joint Committee "shall select the best qualified applicant or applicants" on the basis of the applications on file, the information presented by the applicants, and personal interviews. Section 8.53 of the Port Supplement provides that an applicant "shall be accepted only if he is qualified for the open vacancy". Section 8.6 of the Port Supplement sets forth the "[q]ualification factors that will be considered" by the Joint Committee and Section 8.71 provides that "[a]ll of the above qualifications [which are identified in Section 8.6] must be met by each individual with no exceptions; there shall be no extenuating circumstances". Finally,

Section 8.8 of the Port Supplement lists "disqualification" factors. (Pet.App. 10a-15a).

**D. The 1985 Registration Process**

In March, 1985, the Joint Committee devised and made available applications for registration of additional individuals to be hired into the foremen's unit represented by Local 94. The Joint Committee received 472 applications for approximately 25 initial openings. (Pet.App. 30a).

The applications were reviewed and scored by the Registration Subcommittee of the Joint Committee. The Registration Subcommittee was comprised of eight members: four Local 94 representatives, and four PMA representatives. The Registration Subcommittee used the "Olympic scoring system". Accordingly, each committee member separately scored each application. The highest and lowest scores were discarded. The remaining six scores were averaged to achieve the final score on the application. (Pet.App. 33a).

After the applications were scored, the Subcommittee granted job interviews to the 250 applicants with the highest average application scores. All of the Petitioners herein received interviews. (Pet.App. 33a-34a).

Interviews were held in July, 1985. Each interviewee met separately with the full Subcommittee. The interview consisted of a short written essay on a supervision problem, a verbal quiz that tested the applicant's knowledge of the industry, and a discussion of the applicant's work experience and any factors that would distinguish the applicant over others. At the end of each interview, each committee member filled out a "Foreman Interview Scoring Sheet." (Pet.App. 34a).

After all interviews were completed, the Subcommittee fed the eight separate scores for each interview into a PMA computer. Again using the Olympic scoring system, the Subcommittee had the computer discard the high and low scores and average the remaining six scores to achieve the final score for each applicant. The computer printed a list that ranked the applicants according to their final scores. (Pet.App. 34a-35a).

In August, 1985, the Joint Committee registered the top 23 applicants on the computer list. In November, 1986, the next group of 25 from the top of the list were registered. At the time of the trial in this matter there were remaining 171 individuals ranked on the computer list. The Petitioners herein held the following positions on the subject list:

| Name | Position |
|---|---|
| W. Merino | 90 |
| R. Adler | 116 |
| R. Nervik | 152 |

(Pet.App. 35a-36a).

### E. The Decisions Below

The district court found (Pet.App. 29a-30a) that "the terms of the collective bargaining agreement at issue do not evidence an intent on the part of [PMA and Local 94] to benefit or confer a right of performance on plaintiff-job applicants." Having found a lack of the requisite intent, the district court concluded (Pet.App. 44a) that Petitioners "lack[ed] standing as third party beneficiaries to sue for breach of the collective bargaining agreement . . .". Accordingly, the court dismissed the complaint with prejudice and entered a judgment in favor of Local 94 and PMA.

The court of appeals affirmed. The court explained (Pet.App. 21a) that the finding of the district court—that there was no intent on the part of PMA and Local 94 to benefit or confer a right of performance on job applicants—was not clearly erroneous.

## ARGUMENT

### A. There Is No Reason To Grant The Writ

The court of appeals correctly applied settled principles to the facts of this case. Its decision does not conflict with decisions of this Court or of other courts of appeals. Nor does its decision present special or important federal questions which have not been, but should be, settled by this Court.

Petitioners' conclusory assertion that the decision below impacts "cargo handling and stevedoring activities on the entire West Coast" is left unexplained and, in any event, is without foundation. In fact, this case merely involves a dispute initiated by a handful of dissatisfied job applicants who believe they are "better qualified" to serve as supervisors of longshoremen in the Harbors than the individuals selected. By placing before the district court the many applications and scoring sheets, apparently to show the purported shortcomings of those selected for registration (*see* Pet. 53-64), Petitioners make clear that under the guise of a breach of contract theory, they desire the courts simply to adopt Petitioner's *personal views* as to the qualifications of those registered. However, federal labor law as well as judicial economy prohibit the courts from making hiring decisions for Local 94 and PMA.

Thus, the decisions below—that Petitioners lack standing to sue Local 94 and PMA for their asserted failure to select the "best qualified" applicants—conform to the settled principle that in the American system, private industry must be allowed to make its own employment decisions, even "wrong" ones, free from government intrusion, absent discrimination or other statutory violations. *See United Steelworkers of America v. Webber*, 443 U.S. 193, 206 (1976) (It was the intent of Congress in adopting Title VII that "management prerogatives and union freedoms be left undisturbed to the greatest extent possible."); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (in Title VII action, court of appeals erred in requiring employer to prove that the person hired "had superior objective qualifications for the position."); *Cotton v. City of Alameda*, 812 F.2d 1245, 1249 (9th Cir. 1987) ("The ADEA does not make it unlawful for an employer to do a poor job of selecting employees. It merely makes it unlawful to discriminate on the basis of age."). For these reasons, further review is unwarranted.

### B. Petitioners Lack Standing To Sue As Third Party Beneficiaries Of The Port Supplement

In order to have standing to bring an action for breach of a collective bargaining agreement, a plaintiff must be either a member of the collective bargaining unit covered by that agree-

ment, or otherwise a third party beneficiary of that agreement. *Karo v. San Diego Symphony Orchestra Assn.*, 762 F.2d 819, 821 (9th Cir. 1985) (*Karo*). *See McTighe v. Mechanics' Education Society of America*, 772 F.2d 210, 213 (6th Cir. 1985) (employer had no duty to comply with the terms of the agreement in its dealings with plaintiff "because he was not a member of the collective bargaining unit."). Petitioners herein lack standing to sue as bargaining unit members because, as they concede (Pet. 12), they are not members of the foremen's unit represented by Local 94. Rather, Petitioners are merely individuals who applied for and were denied registration as foremen of longshoremen.

Nor do Petitioners have standing to sue PMA and Local 94 as third party beneficiaries of the Port Supplement. Petitioners cannot establish that they are "third party beneficiaries" under California law, which is applicable to this action. *See Karo*, 762 F.2d at 821, 822.[1]

California Civil Code Section 1559 provides that "[a] contract, made *expressly* for the benefit of a third party, may be enforced by him at any time before the parties thereto rescind it" (emphasis supplied). Interpreting Section 1559, the court explained in *Karo*, 762 F.2d at 821-822, that "[a] third party qualifies as a beneficiary under a contract [only] *if the parties intended to benefit the third party and the terms of the contract make that intent evident*". (emphasis supplied). *Accord: Ascherman v. General Reinsurance Corp.*, 183 Cal.App.3d 307, 311-312, 228 Cal.Rptr. 1 (1986). *See Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1428 n.9 (9th Cir. 1986) citing *Karo* for the following proposition: "when a person is not a member of a collective bargaining unit, and the collective bargaining agreement does not

---

[1] Petitioners cite (Pet. 28) *IBEW v. Hechler*, ___ U.S. ___, 95 L.Ed. 2d 791, 804 n.7, for the proposition that "third party beneficiaries to a collective bargaining agreement ordinarily have the right to bring a . . . claim based on the contract." This statement hardly furthers Petitioners' cause; the question here is not whether third party beneficiaries can sue, but whether the district court clearly erred in finding that Petitioners do not qualify as third party beneficiaries of the Foremen's Agreement and Port Supplement.

grant expressly benefits to third parties, such parties cannot claim third party beneficiary rights."

Further, even if a contract, "if carried out according to its terms, would inure to [the benefit of a third party], it is not sufficient to entitle him to demand its fulfillment. It must appear to have been the intention *of the parties* to secure to him personally the benefit of its provisions." *Walters v. Calderon*, 25 Cal.App.3d 863, 871, 102 Cal.Rptr. 89 (1972) (emphasis in original). *Accord: Walters v. Marler*, 83 Cal.App.3d 1, 32, 147 Cal.Rptr. 685 (1978). *See also Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 440 n.13 (9th Cir. 1979) ("incidental beneficiary" had no standing to sue; "[w]here there was no direct undertaking or intention to benefit him he had no rights under [the] contract"); *Martinez v. Socoma Companies, Inc.*, 11 Cal.3d 394, 113 Cal.Rptr. 585, 521 P.2d 841 (1974) (government contracts under which private manufacturers agreed to provide job training and at least one year of employment to disadvantaged plaintiffs could not be enforced by such plaintiffs as third party beneficiaries; even though plaintiffs unquestionably would benefit from performance of the contracts, there was no intent to confer a direct right of performance on the disadvantaged plaintiffs). Application of the above principles forces the conclusion that Petitioners herein lack standing as third party beneficiaries.[2]

First, the Port Supplement does not expressly name any non-party beneficiaries or identify a class of such beneficiaries. Rather, as the district court found (Pet.App. 29a), "[t]he registration provisions of the Port Supplement apply equally to any individual seeking employment with PMA as a foreman of longshoremen". *See Karo*, 762 F.2d at 822 (agreement equally applicable to any

---

[2] In *Karo, supra*, the court applied the above principles and held that the plaintiff-job applicant was not a third party beneficiary. The court reasoned that "[t]here is nothing in the agreement which indicates that the [selection] procedure is for the benefit" of plaintiff or any particular class that may include plaintiff as a member. Rather, the agreement "[o]n its face . . . is equally applicable to any musician seeking employment with the Symphony. Moreover, there is no indication that the provision was intended to benefit union members rather than the Symphony." 762 F.2d at 822.

musician seeking employment with the Symphony does not meet the "refer to and identify a class" requirement).

Moreover, the registration provisions and procedures jointly established by PMA and Local 94 clearly do not manifest their *intention* to confer upon non-party job applicants a legal right to performance. *See Martinez v. Socoma Companies, Inc.*, 11 Cal.3d at 397 ("the contracts nowhere state that either [party to the contracts is] to be liable to persons such as plaintiffs for damages resulting from the defendants' nonperformance."). Indeed, it is extremely implausible that PMA and Local 94, in adopting the registration provisions of the Port Supplement, ever intended to impose on themselves such a wide net of potential liability.

Rather, the registration procedures and qualifying factors negotiated by PMA and Local 94 are manifestly designed for the benefit of PMA member employers—to ensure that the foremen selected will serve them with a certain level of skill and expertise —and for the benefit of Local 94 and the foremen's bargaining unit it represents—by maintaining the standards of the trade, a traditional trade union goal. This is fully consistent with the clear intent of the other provisions of the Foremen's Agreement and Port Supplement—such as those dealing with wages, hours, manning, management rights and strikes. These provisions, like those of any standard collective bargaining agreement, were obviously agreed to for the mutual benefit of Local 94 and its members and the members of PMA. There is no plausible reason to separate out the registration provisions from the overall purpose and intent of the Foremen's Agreement and Port Supplement.

Thus, the district court's finding that PMA and Local 94 did not intend to grant a right of performance to third parties is not clearly erroneous. Absent a finding of the requisite intent, the district court properly concluded that Petitioners lack standing to sue as third party beneficiaries.

### 1. Petitioners' Contrary Contentions Are Meritless

Petitioners first assert (Pet. 35, 37, 38-39) that as "applicants" for registration, as "individuals on the list of prospective foremen", or as Class "A" longshoremen with 5 or more years of experience, they are members of a class referred to and identified

in the Port Supplement.[3] "As such", Petitioners contend (Pet. 37-38), they "have standing to require PMA and Local 94 to comply with the mandatory provisions . . . of the Port Supplement . . .". Petitioners' argument is obviously deficient, however, because it assumes away the very issue requiring resolution: the issue of intent.

Thus, Petitioners suggest by their argument that a member of a class "referred to and identified" in a contract is, *ipso facto*, a third party beneficiary entitled to enforce the agreement. Of course, as the court explained in *Karo*, and as Petitioners recognize elsewhere in their petition (Pet. 32), the relevant test is not "class membership" but whether "the parties intended to benefit the third party and the terms of the contract make that intent evident." *Karo*, 762 F.2d at 821-822. Petitioners' suggestion, therefore, that a "class member" has a legal right to enforce a contract without showing that the parties intended to confer such a right on the class, is a clear misstatement of third party beneficiary law.

Petitioners next assert (Pet. 39) that the "conduct" of PMA and Local 94, as revealed by certain documentary evidence extrinsic to the contract—the foremen's application, the application instruction sheet and minutes of the Joint Committee—demonstrates that Petitioners have standing to sue as third party beneficiaries. Thus, Petitioners argue, essentially, that because this extrinsic documentary evidence purportedly shows that PMA and Local 94 agreed to govern the registration process in "strict accordance" with Section 8 of the Port Supplement, Petitioners "can reasonably expect and require PMA and Local 94 to comply with the provisions of Section 8 of the Port

---

[3] Petitioners' attempt to create a "class" where none exists is unavailing. Their reliance on the "list of prospective foremen" is without merit for the simple reason that when the Port Supplement was negotiated—indeed, when Petitioners applied for registration—there was no such list in existence. The list was generated only after the applicants had been scored, interviewed and re-scored. Further, the "5 year" requirement does not create a "class"; it is simply another qualification factor which applies equally to all job applicants.

Supplement in selecting individuals for registration as foremen". Petitioners' contention, again, begs the central question of intent. Suffice it to say that the mutual agreement of PMA and Local 94 to be bound by the provisions of the Port Supplement, as interpreted and applied by them, in no way establishes a direct undertaking or intention by them to confer a universal right of performance on applicants for foremen's registration.

Finally, Petitioners argue (Pet. 44-45) that the availability of a grievance forum for dissatisfied applicants "implies an intent on the part of PMA and Local 94 to make Petitioners third party beneficiaries to the contract . . . ". Petitioners fail to articulate, however, the basis for this asserted "implication". In any case, it should be obvious that the availability of a grievance forum for applicants to express their dissatisfaction with the Joint Committee's action on their applications in no way establishes an intention, on the part of PMA and Local 94, to confer a right of performance of the Port Supplement on applicants for foremen's registration. Rather, as the court of appeals explained (Pet.App. 20a), the grievance mechanism

> increases the likelihood a qualified but errantly rejected applicant will be registered. This assists in the selection of the best qualified of those applying . . . .

In relying on the grievance forum, Petitioners turn its significance inside out. It creates, at most, a procedural mechanism which affords unsuccessful applicants an opportunity to inquire as to the reasons for which they were not selected and an opportunity to be heard. This procedure furnishes no substantive rights under the Port Supplement.

If PMA and Local 94 had wished to confer such rights they easily could have made that explicit in the Port Supplement. Yet, they did not do that. Absent such an expression of intent in the Port Supplement, it cannot reasonably be concluded that the grievance forum itself was intended to create any contractual right to performance for non-party job applicants. Petitioners' contrary contention is without merit.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

NORMAN LEONARD
COUNSEL OF RECORD
*Counsel for Respondent*
*ILWU Local 94*

LEONARD, CARDER & ZUCKERMAN
RICHARD S. ZUCKERMAN

GIBSON, DUNN & CRUTCHER
DENNIS A. GLADWELL
J. KEVIN LILLY

*Of Counsel*